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# From Star to Supernova to Dark, Cold Neutron Star: The Early Life, the Explosion and the Collapse of Arbitration

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## From Star to Supernova to Dark, Cold Neutron Star: The Early Life, the Explosion and the Collapse of Arbitration

*Michael Hunter Schwartz\**

### INTRODUCTION

The brightest stars in the sky are both hotter and larger than other stars<sup>1</sup> and they burn more intensely and therefore exhaust their nuclear fuel much faster.<sup>2</sup> The exhaustion of fuel causes the star to explode, thereby creating what astronomers call a "supernova," a phenomenon which is as much as 100 billion times brighter than the average star.<sup>3</sup> At the end of the supernova's short existence, the star partially collapses and becomes a neutron star, which is an extremely dense, cold star.<sup>4</sup> Thus, the very forces that make these stars

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1. ALAN LIGHTMAN, *TIME FOR THE STARS: ASTRONOMY IN THE 1990s*, 32-34 (1992).

2. *Id.* at 35. The brightest stars also are bluer in color than other stars, reflecting the greater heat produced by burning nuclear fuel so quickly. *Id.* at 34.

3. *Id.* at 40-41.

4. *Id.* at 35, 41. Some neutron stars, those with the greatest mass, completely collapse on themselves and end up as "black holes," invisible holes in space. *Id.* at 41.

brighter and, therefore, more attractive to us also cause them to explode and collapse.

In this article, I argue that binding arbitration,<sup>5</sup> a prominent form of Alternative Dispute Resolution ("ADR"),<sup>6</sup> is such a star, destined to burn out and collapse on itself and become a dim part of ADR.<sup>7</sup>

Arbitration has existed in America since before the inception of the United States.<sup>8</sup> Nevertheless, for most of its history in the United States, arbitration has been held in contempt by the courts and the legal profession.<sup>9</sup> In Part I of this article, I review the history of arbitration up to the explosion of arbitration in the mid- to late twentieth century.

Recently, criticism of courtroom adjudication<sup>10</sup> has drastically increased.<sup>11</sup> Critics assert that adjudication is slow, expensive, and rigid at the expense of being just. They also argue that adjudication unwisely persists in trying to address disputes in specialized areas which are beyond its competence, and that adjudication polarizes parties by dividing them into winners and losers.<sup>12</sup>

In what appears to be an attempt to respond to some of these criticisms, the bar, the judiciary and academics have begun to advocate the increased use of all forms of ADR. This increase in advocacy of ADR has been dubbed the "ADR Movement."<sup>13</sup> In addition, the actual use of all forms of ADR, and, in particular, of arbitration, has greatly increased.<sup>14</sup> Advocates hail arbitration as

5. The terms "arbitration" and "binding arbitration" will be used in this article interchangeably to refer only to out-of-court hearings in which one or more independent persons, the arbitrator(s), decide who wins and what is won, and that result is, as a practical matter, final. DAVID MELLINKOFF, MELLINKOFF'S DICTIONARY OF AMERICAN LEGAL USAGE 33 (1992). Non-binding arbitration is the same as binding arbitration except that either party to a non-binding arbitration has the option to reject the arbitrator's decision and obtain a trial de novo. *Id.* This article does not address non-binding arbitration. Another distinction often made in articles addressing arbitration is between contractual or voluntary arbitration, on the one hand, and court-ordered arbitration, which is also known as court-annexed arbitration, on the other. The former requires an agreement between the parties to arbitrate their dispute whereas the latter occurs when a court orders the parties to arbitrate. This article does not distinguish between binding voluntary and court-annexed arbitration because the issues identified apply to all forms of binding arbitration.

6. The term ADR will be used in this article in a broad sense to refer to any method of resolving a legal dispute that does not involve a trial in a court established by a state or federal government. *Id.* at 16. ADR includes, among other things, arbitration, mediation, and mini-trials. *Id.*

7. This article does not address the efficacy of other forms of ADR. For arguments that mediation also has deficiencies, especially for women, see Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992).

8. See *infra* note 20 and accompanying text.

9. See *infra* notes 28 - 49 and accompanying text.

10. Throughout this article the term "adjudication" will be used to refer to trial in a state or federal courtroom where either a jury or judge is the trier of fact.

11. See *infra* notes 55 - 61 and accompanying text.

12. See *infra* notes 62 - 69 and accompanying text.

13. See, e.g., Kenneth Penegar, *Preface: The Elusive Promise of Legal Reform*, 46 SMU L. REV. 1889, 1890 (1993) (arguing that the "ADR Movement" is the most significant change in the legal system in the twentieth century).

14. See *infra* notes 50 - 54 and accompanying text.

one of the brightest forms of dispute resolution.<sup>15</sup> They argue that arbitration is a faster, cheaper and perhaps even better form of dispute resolution than adjudication.<sup>16</sup> I see this expansion phase in the history of arbitration as the supernova of arbitration, the time when arbitration has generated the most excitement. In Part II of this article I trace the rise of arbitration and examine its asserted benefits.

The very qualities that make arbitration seem attractive, however, are also the qualities that will cause it, at least as an important and often-used form of dispute resolution, to collapse. In fact, identification of possible instabilities in the arbitration star have already been made.<sup>17</sup> In Part III of this article, I describe the problems which have been identified, detail additional problems and argue that the problems derive from the very attributes of arbitration that have been lauded. In Part IV, I describe possible solutions to the problems.

Finally, in Part V of this article, I elucidate my thesis that addressing the problems of arbitration will cause it to collapse. I argue that the proposed solutions will fail on three different levels. First, some of the deficiencies of arbitration cannot be remedied. Second, the solutions for arbitration's ills necessarily will involve adapting procedures from adjudication to arbitration; such adaptation will prove difficult to tailor to the arbitration form and difficult to implement. Finally, attempts to save arbitration will make arbitration so much like court trials that the qualities that have made arbitration attractive will be lost.

Arbitration will be squeezed between the pressure to expand, in response to society's concerns regarding court trials, and the pressure to improve, which requires making arbitration more like adjudication. If the only way to save arbitration is to make it like adjudication, and if, even then, we really cannot cure arbitration's deficiencies, arbitration must collapse on itself. Like a supernova which is compressed by the extraordinary pressure of gravity into a cold, dark, neutron star, arbitration cannot survive the pressures inherent in its nature. Eventually, arbitration must cease being an important part of the ADR Movement.

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15. See Jethro K. Lieberman and James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, (1986); Jane B. Korn, *Changing Our Perspective on Arbitration: A Traditional and a Feminist View*, 1991 U. ILL. L. REV. 67 (1991); Alan S. Rau, *Resolving Disputes Over Attorneys' Fees: The Role of ADR*, 46 SMU L. REV. 2005 (1993).

16. See, e.g., Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239, 255 (1987).

17. See Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985); Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1 (1987); Richard Reuben, *The Dark Side of ADR*, CAL. LAW., (Feb. 1994, at 53).

## I. THE HISTORY OF ARBITRATION

*From Colonial Times to the Twentieth Century*

Concerns regarding problems with the speed, cost, capacity, and flexibility of adjudication, which, in recent years, have spawned the ADR movement,<sup>18</sup> were first raised when arbitration came to the New World.

Arbitration has been traced as far back as thirteenth century England.<sup>19</sup> Along with its legal system, England exported arbitration, pretty much in its current form, to its American colonies.<sup>20</sup> The colonists' distrust of the law and desire for social harmony caused them to seek means other than adjudication to resolve disputes.<sup>21</sup>

By the mid-eighteenth century, the colonial merchants had come to perceive a conflict between judicial settlement of disputes and their need for privacy and cooperation.<sup>22</sup> They therefore developed their own private tribunals using merchant decision-makers. In fact, one of the reasons the merchants formed the New York Chamber of Commerce was their desire to organize arbitration of disputes.<sup>23</sup>

At the same time, the eighteenth century saw a great rise in preference for adjudication as a means of dispute resolution. As a result, adjudication became the overwhelming norm for dispute resolution.<sup>24</sup> This preference is reflected in the United States Constitution, in which the legal system is given co-equal status with the executive and legislative branches of government.<sup>25</sup>

The nineteenth century included periods of minor rises in the popularity of arbitration. The conflicts between the former slaves and former slave owners often were resolved in "Freedman's Tribunals," which, in practice, appear to have been a means for reenforcing white power and white supremacist views.<sup>26</sup> Arbitration also was championed in the latter part of the nineteenth century as a means of calming labor tensions.<sup>27</sup> The judiciary, however, was overtly hostile to and distrustful of arbitration.<sup>28</sup>

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18. See *infra* notes 54 - 61 and accompanying text.

19. Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 854 (1961).

20. JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 4, 20 (1983). For example, arbitration is explicitly identified as a preferred means of dispute resolution in a 1635 Boston ordinance. *Id.* at 23.

21. *Id.* at 19-20.

22. *Id.* at 33.

23. Mentschikoff, *supra* note 19, at 855.

24. AUERBACH, *supra* note 20, at 41.

25. THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (New American Library 1961).

26. AUERBACH, *supra* note 20, at 59.

27. *Id.* at 62.

28. See Kanowitz, *supra* note 16, at 254.

*The Early and Mid-Twentieth Century History of Arbitration*

The twentieth century has seen the increased legalization of arbitration; it has moved away from its historical a-legal approach and status and has become more law-bound and law-governed.<sup>29</sup> In 1920, for example, New York enacted the first pro-arbitration statute, which provided that errors of law by an arbitrator were not grounds for setting aside an arbitration award,<sup>30</sup> and that agreements to arbitrate could not be revoked.<sup>31</sup> Until very recently, however, the courts continued to regard arbitration with considerable disdain.

Insight into this disdain can be gained from examining how early mid-twentieth century courts discussed arbitration.<sup>32</sup> A 1918 California Supreme Court opinion declared that an arbitration clause is "void as an attempted interference with the power and jurisdiction of the courts to decide controversies between parties to contracts."<sup>33</sup> The suggestion that arbitration interferes with the "power" and "jurisdiction" of the legal system suggests a belief that arbitration posed a competitive threat to the legal system.

The use of the word "void" is also significant. It suggests that an arbitration clause is not merely undesirable but is, in fact, so repugnant that it should be deemed never to have existed at all. Arbitration clauses, of course, are simply contract terms. In contract law, the use of the term "void" typically is used only for illegal contracts, such as a promise to kill someone in exchange for money. Because killing is a crime, the courts hold that such a promise is "void."<sup>34</sup> Here, the word "void" means that the promises do not create any obligation.

In contrast, contracts with persons who lack the capacity to contract, such as minors, and contracts entered into on the basis of mistake or even fraud are described as "voidable."<sup>35</sup> Even many illegal bargains are designated merely as "unenforceable," rather than as void.<sup>36</sup> Thus, the use of the word "void"

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29. AUERBACH, *supra* note 20, at 110-11.

30. Mentschikoff, *supra* note 19, at 856.

31. AUERBACH, *supra* note 20, at 104.

32. In several places in this article, the language used by courts in discussing arbitration is examined in an attempt to gain insight into how the legal system viewed arbitration. This close textual analysis stems from a belief that an author's (or judge's) views may be revealed in the tone and structure of what she writes even if she was not consciously aware of those views. This practice is commonly employed in other fields, such as literary criticism. See, e.g., D. W. HARDING, *Regulated Hatred: An Aspect of the Work of Jane Austen*, in 20TH CENTURY LITERARY CRITICISM: A READER 263 (D. Lodge ed., 1972) (arguing that, contrary to appearances, Jane Austen's work contains evidence that she greatly disliked the society depicted in her novels). The application of techniques of literary criticism to legal opinions is justified by the fact that, "Judges . . . resemble literary artists in the close attention they pay to the choice of words in which to express themselves. . . ." RICHARD A. POSNER, *LAW AND LITERATURE*, 8 (1988).

33. *North American Co. v. Outer Harbor Co.*, 178 Cal. 406, 413, 173 P. 756, 759 (1918).

34. JOHN D. CALAMARI AND JOSEPH M. PERILLO, *CONTRACTS*, §§ 1-11, at 18 (West 3d ed., 1987).

35. *Id.* at 19.

36. *Id.*



expresses legal conclusions of illegality and non-recognition and reflects a very strong judicial antipathy for arbitration.

This antipathy existed even in New York where arbitration was first given statutory recognition as an enforceable contractual promise. *In re Friedman*,<sup>37</sup> which was decided six years after the enactment of the New York's pro-arbitration statute, express a large measure of fear and distrust of arbitration. *Friedman* addressed the seemingly simple question of whether an arbitrator's decision could be enforced where the arbitrator received a substantial loan from one of the litigants during the pendency of the arbitration.<sup>38</sup> The *Friedman* court held that the decision should not be enforced.<sup>39</sup> What is striking is the court's explanation of some of the reasons for its decision. The court stated:

During recent years arbitration has been more and more resorted to for the settlement of business controversies. It therefore becomes of the utmost importance that . . . where the rights of parties are adjudicated, *not by trained lawyers and judges, but by fellow business men*, every safeguard possible should be *thrown about* the proceeding. . . .<sup>40</sup>

The court's perception of a need for extra safeguards suggests some distrust of arbitrators and arbitration. This distrust is more clearly manifested in how, and by what language, the court juxtaposes the legal system with arbitration. The court chooses the word "trained" to describe lawyers and judges, who, the court emphasizes, will *not* be deciding the case. The court states that, instead, the case will be decided by businessmen arbitrators. The only adjective used to describe the arbitrators is the word "fellow." The use of the word "fellow" to modify businessmen, especially given its context, in a parallel structure comparing arbitrators to the "trained lawyers and judges," seems both to suggest that businessmen are not qualified and to reflect a belief that there may be some sort of collusion (fellowship) among these businessmen in arbitrating rather than adjudicating each other's disputes.

Equally revealing is the court's unusual choice in words for the suggestion that more protection is needed for arbitration. The court tells us that safeguards need to be "thrown about" the arbitration proceeding. The physical image of safeguards being thrown about a proceeding reflects tremendous fear of arbitration. It suggests that the court views arbitrations as being haphazard, rather than reasoned and controlled. It also suggests that arbitration is so out of control that extra safeguards are needed for arbitration because some of the safeguards may miss their targets and, therefore, fail to protect the parties.

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37. 213 N.Y.S. 369 (1926).

38. *Id.* at 375.

39. *Id.*

40. *Id.* at 375-76 (emphasis added).

Because I believe that safeguards are more typically “adopted” or perhaps “utilized” or “applied,” I see this language as reflecting a fundamental distrust of arbitration as a method of dispute resolution.

A few years later, Congress followed New York’s lead in making arbitration agreements irrevocable by enacting the Federal Arbitration Act.<sup>41</sup> The first Uniform Arbitration Act was approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in 1955.<sup>42</sup> A 1953 Supreme Court opinion makes it clear, however, that considerable judicial distrust of arbitration continued through the mid-twentieth century.

*Wilco v. Swan*<sup>43</sup> involved a question regarding the ability to arbitrate a claim for damages under section 12(2) of the Securities Act of 1933.<sup>44</sup> The parties’ contract contained an express arbitration clause.<sup>45</sup> When the plaintiff sued in the District Court for the Southern District of New York, the defendant moved to stay the action pending arbitration of the plaintiff’s claims in accordance with the contractual arbitration clause.<sup>46</sup>

The plaintiff challenged the stay, arguing that the arbitration clause constituted a waiver of the Securities Act’s explicit grant of a right to sue in federal court, and that any waiver of a right conferred by the Act is “void.”<sup>47</sup> The Supreme Court agreed.<sup>48</sup> While the holding itself seems to reflect a strong distrust of arbitration, the Court’s explanation of the reasons for its decision leaves no doubt that the Court disliked arbitration:

This case requires subjective findings on the purpose and knowledge of an alleged violator of the Act. They must be not only determined but applied by the arbitrators without judicial instruction on the law. As their award may be made without explanation of their reasons and without a complete record . . . the arbitrators’ conception of the legal meaning of such statutory requirements as “burden of proof,” “reasonable care” or “material fact,” . . . cannot be examined.<sup>49</sup>

The Court’s concern regarding the “arbitrators’ conception” of relatively easy legal concepts such as “burden of proof” and “material fact” suggests that the Supreme Court believed that arbitrators cannot handle even relatively simple legal issues. The Court also focused on what it perceived to be missing

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41. 9 U.S.C. § 1 et seq. (1947).

42. *Unif. Arbitration Act*, 7 U.L.A. 5 (1955).

43. 346 U.S. 427 (1953) *overruled by* *de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

44. *Id.* at 428.

45. *Id.* at 429.

46. *Id.*

47. *Id.* at 430.

48. *Id.* at 434-35.

49. *Id.* at 435-36.



in arbitration, a focus which is reflected in the Court's repeated use of the word "without." Although Congress appeared to have developed confidence in arbitration by 1953, the Court was not yet ready to concur.

It was not until fairly recently that the pressure on the legal system became so great that ADR became an institution in itself, revered not only by the public, but also by judges, lawyers, and law professors.

## II. THE EXPLOSION OF ARBITRATION

### *Arbitration in the Late Twentieth Century*

In the past few years there has been dramatic change in the legal community's attitude towards arbitration. Arbitration has changed from being relatively unused and disdained to being a popular, oft-championed form of dispute resolution. Arbitration of disputes has exploded; binding arbitration clauses are being written into a greatly increasing number of contracts<sup>50</sup> in a wide variety of contexts, from employment contracts to construction and real estate contracts, and from insurance contracts to securities contracts.<sup>51</sup> Even the morning cereal is not immune; General Mills recently announced that its Honey Nut Cheerios cereal boxes now will include arbitration clauses for disputes arising out of General Mills' Sega game sweepstakes.<sup>52</sup>

Disputes therefore are being arbitrated in increasing numbers. For example, Judicial Arbitration and Mediation Service, Inc. (JAMS) has grown by more than 2,300% in just the past six years.<sup>53</sup> Commentators usually trace this change to an increase in dissatisfaction with courtroom dispute resolution,<sup>54</sup> the expression of which has also greatly increased in recent years.

### *The Criticism of Adjudication*

The criticisms of adjudication can be divided into two categories: (a) criticisms of the efficiency of adjudication and (b) criticisms relating to the quality of adjudication.

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50. Reuben, *supra* note 17, at 54.

51. *Id.* at 55.

52. PAMELA SEBASTIAN, *Business Bulletin: Breakfast of Arbitrators?*, WALL ST. J., June 30, 1994, at 1.

53. Reuben, *supra* note 17, at 55.

54. See AUERBACH, *supra* note 20, at 123; Reuben, *supra* note 17, at 54; BRUNET, *supra* note 17, at 2-3; Kanowitz, *supra* note 16, at 255, 303. But see Louis J. Weber, Jr., *Court-Referred ADR and the Lawyer-Mediator: In Service of Whom*, 46 SMU L. REV. 2113 (1993) (arguing that the rise in attorney support of ADR stems from a self-interest in arbitrating or mediating the disputes for income).

*Efficiency Criticisms.* Citing the increased case load of the courts, commentators argue that the legal system is simply too slow.<sup>55</sup> At least some commentators, however, dispute the caseload statistics. These commentators contend that the statistics are inflated by the inclusion of undisputed matters such as name changes, uncontested divorces and the probate of wills. The filing of these matters, the commentators argue, has increased disproportionately in recent years.<sup>56</sup> Even given the possibility of inflation, the increase in court filings is startling. More than two and a half times more cases were filed in 1980 than in 1934.<sup>57</sup> Moreover, the time from filing to trial, at least in some areas, now is three years or longer.<sup>58</sup> Experts predict that the situation probably will worsen in the future; filings are expected to triple in the next twenty-five years.<sup>59</sup>

Critics of adjudication also argue that the cost of adjudication has become so prohibitive that most people cannot afford to resolve their disputes in court.<sup>60</sup> For example, a partner with a national law firm regularly warns his clients that a typical commercial case requiring one week of trial probably will cost the client between \$100,000 and \$150,000. He also tells them that a number of his cases have not merely exceeded the \$150,000 high-side estimate but actually have doubled it.<sup>61</sup>

*Quality Criticisms.* Others have criticized the legal system for being disconnected from the real world. In other words, some critics question the ability of a rigid, rule-based system to resolve complicated disputes where conventional answers based on conventional notions of property and rights may be impossible.<sup>62</sup> For example, traditional race and sex discrimination doctrine is flawed because it demarginalizes those who fall within the intersection of both, such as black women.<sup>63</sup> Courts and commentators deny the compound nature of the experience of black women by treating them as being either too much like women to represent blacks or too much like blacks

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55. See, e.g., Judge Robert M. Parker & Leslie J. Hagin, "ADR" Techniques in the Reformation Model of Civil Dispute Resolution, 46 SMU L. REV. 1905, 1907 (1993).

56. See Brunet, *supra* note 17, at 5.

57. Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374, 396 n.85 (1982-1983).

58. Parker & Hagin, *supra* note 55, at 1908.

59. *Id.* at 1909.

60. *Id.* at 1906.

61. Notes of June 21, 1994, telephone conversation on file with author. The name of the speaker and of his law firm have been withheld on request. It is my understanding that the billing rates of the law firm actually are lower than many of its competitors' rates.

62. See Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. L. & SOC. CHANGE 369 (1982-83).

63. Kimberle W. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 UNIV. CHI. LEGAL F. 139 (1989).

to represent women or by ignoring the intersection of both in cases involving black women.<sup>64</sup>

Commentators also argue that the legal system polarizes the parties by dividing them into winners and losers and thereby forfeits any possibility of a resolution that might preserve the parties' relationship.<sup>65</sup> The courts do not consider and, usually, cannot consider compromise or flexible solutions to the disputes before them. As a result, court trials may increase rather than soothe hostilities.<sup>66</sup>

Another criticism often articulated is that courts are forced to address disputes in specialized areas which are beyond their competence.<sup>67</sup> Some argue that it is too "daunting" to a litigant or her<sup>68</sup> attorney to have to educate a jury or judge about particular industry practices.<sup>69</sup>

### *The Rise of Arbitration*

Although the connection between the increase of criticism of the legal system and the rise of arbitration as a popular means of dispute resolution is unclear, the drastic change in the legal system's and the public's attitude towards arbitration is unmistakable. Arbitration is praised by its proponents with almost evangelical fervor;<sup>70</sup> even those who have been critical of some aspect of arbitration or ADR or who advocate avoiding arbitration or ADR under certain circumstances nevertheless hasten to communicate that they value arbitration as a means of dispute resolution.<sup>71</sup> Arbitration has become politically correct.

The language used by the courts in recent cases to discuss arbitration reflects this drastic change and stands in sharp contrast to the language found in earlier twentieth century cases like *Wilco* and *Friedman*. In *Perini Corp. v. Great Bay Hotel & Casino, Inc.*,<sup>72</sup> the New Jersey Supreme Court noted that "judicial attitudes about arbitration have changed significantly" from "mistrust" to a "strong commitment to arbitration."<sup>73</sup> More significantly, the court defined arbitration as "a substitution, by consent of the parties, of

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64. *Id.*

65. *Id.* at 2025. See also Korn, *supra* note 15, at 102.

66. Crenshaw, *supra* note 63, at 2025.

67. See, e.g., Rau, *supra* note 15, at 2029.

68. In this article, I use only female gender pronouns where gender is neutral, much as, in traditional legal writing, only male gender pronouns are used. This choice stems from my belief that such juxtapositions of traditional forms have the potential for transformative power. For a discussion of the transformative possibilities inherent in pornography, see Susan E. Keller, *Review Essay: Justify My Love*, 18 W. ST. U. L. REV. 463 (1990).

69. Rau, *supra* note 15, at 2029.

70. See sources cited *supra* note 54.

71. See, e.g., Delgado et al., *supra* note 17, at 1402; Brunet, *supra* note 17, at 56.

72. 610 A.2d 364 (N.J. 1992).

73. *Id.* at 369.

another tribunal for the tribunal provided by the ordinary process of law,' and its object is 'the final disposition, in a speedy, inexpensive, expeditious and perhaps less formal manner, of the controversial differences between the parties.'"<sup>74</sup>

The change in judicial attitude towards arbitration here is dramatic. While the *Friedman* court contrasted the "trained" decision-makers in adjudication with the "fellow businessmen" decision-makers in arbitration,<sup>75</sup> the *Perini* court uses the same word, "tribunal," to describe both adjudication and arbitration. To the *Perini* court, arbitration is simply a "substitution" of one equal for another. Likewise, although the *Wilco* court expressed doubt about the quality of arbitral justice,<sup>76</sup> the *Perini* court details arbitration's virtues: "speedy, inexpensive, expeditious and perhaps less formal."<sup>77</sup>

The Supreme Court also appears to have changed its opinion of arbitration drastically. In *Rodriguez de Quijas v. Shearson/American Express, Inc.*,<sup>78</sup> the Supreme Court expressly overruled *Wilco* and held that a claim of a securities violation was arbitrable.<sup>79</sup> In so holding, the Court contrasted what it called the "old judicial hostility to arbitration" with "our current strong endorsement of . . . [arbitration]."<sup>80</sup> This "strong endorsement" sharply contrasts with the *Wilco* court's criticisms of arbitration.<sup>81</sup>

#### *The Asserted Benefits of Arbitration*

Kenneth Penegar notes that the asserted benefits of arbitration can be divided into two categories, not unlike the two categories identified above with respect to the criticisms of courtroom dispute resolution. What Penegar calls the "cool" benefits of arbitration, greater speed and lower cost,<sup>82</sup> correspond to the efficiency criticisms of adjudication; what Penegar calls the "warm" benefits of arbitration, its greater flexibility, its ability to use "expert" decision makers, and its ability to make decisions that preserve relationships,<sup>83</sup> correspond to the quality criticisms of adjudication. An additional "warm" benefit asserted for arbitration, which Penegar does not address and categorize, is that arbitration is private.<sup>84</sup>

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74. *Id.* quoting *Barcon Assoc. v. Tri-County Asphalt*, 430 A.2d 214 (N.J. 1981).

75. *See In re Friedman*, 213 N.Y.S. 369 (1926).

76. *See Wilco v. Swan*, 346 U.S. 427 (1953).

77. *Perini Corp. v. Great Bay Hotel & Casino, Inc.*, 610 A.2d 364, 369 (N.J. 1992).

78. 490 U.S. 477 (1989).

79. *Id.* at 480.

80. *Id.* at 480-81.

81. *See supra* notes 43 - 49 and accompanying text.

82. Penegar, *supra* note 13, at 1892.

83. *Id.*

84. Mentschikoff, *supra* note 19, at 849; Rau, *supra* note 15, at 2029.

*Analysis of “Cool” Benefits of Arbitration*

The “cool” benefits of arbitration, greater speed and lesser cost, are readily apparent and are not subjects of great dispute. Actually, the two benefits are intertwined; part of what makes arbitration cheaper is that it is faster. Arbitrations, on the average, are completed more quickly than adjudications.<sup>85</sup> The greater speed is attributable to the availability of more arbitrators than judges, the lack of discovery, and the informality of arbitration.

Although the participants in arbitration must pay the fees of the decision-maker, this expenditure is more than offset by savings in attorney’s fees.<sup>86</sup> This reduction in attorney’s fees probably stems from a combination of factors. Arbitration is less formal. Arbitrators ignore evidentiary issues. Formal presentation of evidence is eschewed in favor of informal story-telling. Informality and the lack of evidentiary disputes save attorney time and effort, thereby reducing attorney fees. Arbitration also lacks formal pleading and discovery, which tend to extend the time until trial and result in the payment of substantial attorney fees.

*Analysis of the “Warm” Benefits of Arbitration*

Unless judicial involvement is sought either to confirm the arbitration award or to request judicial review of an arbitration award, arbitration occurs in private. It is much less clear that the other “warm” benefits attributed to arbitration, namely flexibility, relationship-preservation and expertise in the area of dispute, actually occur.

Parties to arbitration sometimes do select an expert decision-maker. The existence of actual incarnations of the ideal arbitrator, a flexible, knowledgeable, relationship-oriented decision-maker, never has been shown. Rather, arbitrators often are simply practicing or semi-retired attorneys or retired judges,<sup>87</sup> and most arbitrators strive to follow the law.<sup>88</sup> Even an arbitrator who has expertise in the area of the dispute may not meet the asserted ideal. A lack of experience outside the arbitrator’s area of expertise may produce decisions that have a pro-field bias or may limit the arbitrator’s world-view so that it narrows her perception of the spectrum of resolution alternatives.

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85. See Rau, *supra* note 15, at 2027 n.83 (average time to completion of arbitration is a little over four months); Parker & Hagin, *supra* note 55, at 1908 (average time to completion of adjudication is 11.7 months).

86. Rau, *supra* note 15, at 2028-29.

87. AUERBACH, *supra* note 20, at 111.

88. *Id.* at 110-11.

### III. THE DEFICIENCIES OF ARBITRATION

In a sense, the vices of arbitration are its virtues. In the first part of this section, deficiencies are categorized as (1) process flaws, (2) symbolic or systemic flaws or (3) results flaws. If the deficiency arises out of arbitration's lack of formal procedures and codes of behavior, it is categorized as a process flaw. If the deficiency stems from the loss of the symbolic or systemic value of the courtroom process, it is categorized as a symbolic or systemic flaw. Finally, if the deficiency relates to the absolute finality given to arbitrator decisions, it is categorized as a results flaw.<sup>89</sup>

In the second part of this section, I connect the deficiencies to the benefits that engendered them. In so doing, I reveal the complicated relationships between the categories adopted in this section (process flaws, symbolic or systemic flaws and results flaws), on the one hand, and the asserted deficiencies of adjudication (efficiency and quality) and the asserted benefits of arbitration (warm and cool), on the other.

Throughout this section, California arbitration law is used as the basis for analysis. California arbitration law is not unusual or unique in any of the areas discussed below.

#### *Identification and Analysis of Deficiencies*

##### *Process Flaws*

*Disclosure of Parties' Claims and Defenses.* There is no statutory or judicial requirement that either party to an arbitration fully disclose the nature, extent and amount of either her claims or her defenses. The American Arbitration Association ("AAA"), the organization responsible for administering many arbitration claims throughout the United States, provides, upon request, claim forms which request information regarding the complaining party's complaints.<sup>90</sup> Neither use of the forms nor any other method of claim disclosure is required either by statute or by court decision.<sup>91</sup> The AAA forms themselves require only that a claimant disclose the nature of the claim. For

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89. Policy arguments on both sides of the issue are discussed in recognition of the indeterminacy of policy argument. See Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 534-35 (1986).

90. See AMERICAN ARBITRATION ASS'N, COMMERCIAL ARBITRATION CLAIM FORM [hereinafter AAA FORM]. The form allows the complaining party approximately one inch each for the party to state "The Nature of the Dispute" and "The Claim or Relief Sought."

91. Neither California's arbitration statutes nor the Uniform Arbitration Act require disclosure of a party's claims at the pleading stage.



example, the claimant need only disclose that the claim is for "breach of contract," and the claimant is seeking "such damages as may appear to the arbitrator to be just and proper."<sup>92</sup> Thus, a property owner might present an arbitration claim to her general contractor for breach of contract without detailing the specific construction deficiencies or the amount she claims as damages.

According to Jack Friedenthal, Mary Kay Kane and Arthur Miller, such disclosure is crucial to the just resolution of disputes; they argue that pleading requirements serve two important purposes. Pleading requirements ensure minimal disclosure by both parties, which assist the parties in preparing their strategies. These requirements also provide information to the court which facilitates the court's efforts in managing and helping to resolve the parties' claims.<sup>93</sup> Other commentators argue that disclosure necessarily slows the speed of and increases the expense of dispute resolution.<sup>94</sup> Formal pleading and pleading disputes require attorney and court time, thereby increasing attorney fees.

*Exchange of Evidence.* No discovery in any form is required by arbitration law.<sup>95</sup> The parties are left to their own imaginations with respect to case preparation. They therefore risk losing crucial evidence that may be available only from their opponents. As the Supreme Court explained in *Hickman v. Taylor*,<sup>96</sup> the open discovery policy established by the Federal Rules of Civil Procedure means that "civil trials . . . need [not] be carried on in the dark."<sup>97</sup>

In fact, there is no requirement, at least in a case involving \$50,000 or less, that either party disclose the name and nature of any testimony to be given by any witness.<sup>98</sup> This rule holds true for both percipient and expert witnesses. Consequently, neither party can anticipate nor respond to the other party's witnesses.

The absence of disclosure, either by formal pleading or through discovery, of the nature, extent or amount of the claimant's complaints leaves disputants completely unable to allocate resources, negotiate settlement, or determine the need for their own expert witnesses. In short, plotting strategy in arbitrations is guesswork.

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92. See AAA FORM, *supra* note 90.

93. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE, 240 (2d ed., 1993).

94. See, e.g., Rau, *supra* note 15, at 2028.

95. CAL. CIV. PROC. CODE § 1283.05 (West 1994).

96. 329 U.S. 495 (1947).

97. *Id.* at 501.

98. CAL. CIV. PROC. CODE § 1282.2 (West 1994).

Of course, if the parties are in a long-standing relationship, such guesswork, as a practical matter, may not be difficult. In any event, there is a consensus that attorneys and parties often abuse discovery in adjudication;<sup>99</sup> such abuse slows the time to trial and increases attorney fees.<sup>100</sup>

*Evidentiary Limitations.* The rules of evidence also do not apply to arbitrations.<sup>101</sup> Some argue that, as a whole, evidence rules are too abstract, too hierarchical and too adversarial,<sup>102</sup> and individual evidence rules are antiquated. Nevertheless, at least some evidentiary objections can be seen as salutary.

For example, the hearsay objection<sup>103</sup> reflects a distrust of statements made by a person who (a) was not present in court when the statement was made so that the trier of fact may judge her credibility, (b) is not subject to cross-examination, and (c) was not under oath when the statement was made so she had no legal compulsion to be truthful.<sup>104</sup> If a court is convinced that the hearsay evidence is credible, the court will admit it.<sup>105</sup> In arbitration, neither the policies underlying the hearsay rule nor its exceptions are entertained. Instead, untrustworthy hearsay evidence is regularly admitted.

The various privileges, including the doctor-patient and spousal communications privileges,<sup>106</sup> arguably also have benefits worth considering. The privileges reflect a choice to forego the presentation of relevant evidence to protect personal privacy and to encourage frank, open and honest communication between doctor and patient or between spouses.<sup>107</sup> The prohibition against the use of settlement negotiations as evidence<sup>108</sup> reflects the similar goal of encouraging frank and open settlement negotiations.<sup>109</sup>

The power of courts to exclude potentially relevant evidence where the value of the evidence is substantially outweighed by the potential to unfairly prejudice the fact-finder<sup>110</sup> reflects a different choice. The courts have

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99. See, e.g., FRIEDENTHAL ET AL., *supra* note 93, at 422.

100. See Rau, *supra* note 15, at 2028.

101. CAL. CIV. PROC. CODE § 1282.2(d) (West 1994).

102. Kit Kinports, *Evidence Engendered*, 1991 U. ILL. L. REV. 413 (1991).

103. See, e.g., CAL. EVID. CODE §§ 1200 et. seq. (West 1994).

104. MCCORMICK ON EVIDENCE, § 245, at 93. (John W. Strong ed., 4th ed. 1992).

105. *Id.* § 324, at 363-64. Examples of where this policy has been applied by the legislature to conclude that such statements always are admissible include the exception to the hearsay rule for a statement made by a dying person regarding the cause of her death and a statement that is an admission of wrongdoing. See, e.g., CAL. EVID. CODE §§ 1242, 1220 (West 1994). In both these situations, the court has reason to believe that the speaker is trustworthy.

106. See, e.g., CAL. EVID. CODE §§ 980, 992 (West 1994).

107. MCCORMICK ON EVIDENCE, *supra* note 104, § 72 at 269-70.

108. See, e.g., CAL. EVID. CODE § 1152 (West 1994).

109. MCCORMICK ON EVIDENCE, *supra* note 104, § 72.1 at 271.

110. See, e.g., CAL. EVID. CODE § 352 (West 1994).

determined that the risk of prejudicing or misleading the fact-finder can be so significant that it may choose to withhold somewhat relevant evidence.<sup>111</sup>

The absence of these objections in arbitration raises the potential for a chilling effect on communications society wishes to encourage and a greater possibility that an arbitrator could be biased by learning highly prejudicial facts.<sup>112</sup>

The discovery deficiencies described above produce an interesting effect: arbitration has the potential to flip society's evidentiary aspirations. Because evidence cannot be obtained through discovery in arbitration, some evidence is not introduced that society probably would wish to be introduced. At the same time, because evidence cannot be barred by rules of evidence in an arbitration, some evidence is introduced that society probably would not wish to be introduced.

*Witness Honesty.* Arbitration law does not require witnesses to testify under oath.<sup>113</sup> An oath requirement certainly does not ensure honesty by witnesses, however, the lack of an oath and the implicit threat of sanctions for perjury may encourage arbitration witnesses to lie. Criminal sanctions have some deterrent effect at least if the person who is contemplating a criminal act believes that she is very likely to be caught, convicted and punished.<sup>114</sup> Because adjudication perjury occurs before a judge, who ostensibly has the power to punish the perjurer, the threat of punishment for perjury arguably has a deterrent effect.

*Selection, Qualifications and Integrity of Arbitrator.* Several factors combine to make the process of arbitrator selection problematic. There are no legally required qualifications for one to be, or hold herself out as, an arbitrator.<sup>115</sup> Moreover, arbitrators do not swear an oath before performing their arbitral duties,<sup>116</sup> and arbitrators are not bound by any established ethical standards.<sup>117</sup> There is no formal review of complaints regarding arbitrators.<sup>118</sup>

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111. MCCORMICK ON EVIDENCE, *supra* note 104, § 185 at 780-81.

112. The dangers of introducing inappropriately prejudicial facts may be even greater in an informal setting like arbitration than in a formal setting like adjudication. Bias is more likely in informal settings. See Delgado et al., *supra* note 17, at 1388-89.

113. CAL CIV. PROC. CODE § 1282.2(d) (West 1994); Sapp v. Barenfeld, 34 Cal. 2d 515, 520, 212 P.2d 233, 237 (1949).

114. See Michael Davis, *Book Review: Why Punish?* by Nigel Walker, 12 L. & PHIL. 395 (1993).

115. Robinson v. Superior Court, 35 Cal. 2d 379, 387, 218 P.2d 10, 16 (1950).

116. 6 CAL. JUR. § 36, at 77 (3d ed. 1994).

117. Reuben, *supra* note 17, at 55. Reuben also notes that arbitrators cannot be reviewed by the state Commission on Judicial Performance or even by the State Bar Association.

118. *Id.* at 53.

There is no empirical evidence that arbitrators decide cases unjustly or unethically. Arbitrators, however, are expected to self-monitor conflicts of interest,<sup>119</sup> even though the potential for conflicts of interest are great. Unlike most judges, arbitrators not only have separate business interests that may create conflicts, but arbitrators also have an economic self-interest in deciding cases in such a way as to maximize the possibility of getting return business.<sup>120</sup>

This latter potential conflict stems from the fact that arbitrators often perform their services as a career or at least as a way of supplementing their income from practicing law or from working in another field of expertise. An income-maximizing arbitrator has a strong incentive to decide the disputes she hears in favor of the party and/or the attorney who is most likely to need arbitral services again. For example, in a dispute between a large construction company and a one-woman tile-setting operation, the income-maximizing arbitrator would find a way to decide in favor of the general contractor. The general contractor is not only likely to be the party that insisted upon and drafted the arbitration clause, but also is likely to have more construction business and therefore to produce more arbitrable disputes.

If the parties' contract does not provide for a method of arbitrator selection, a judge will select one.<sup>121</sup> Where the parties have simply adopted the rules of the AAA, and the dispute involves less than \$50,000, the AAA automatically selects an arbitrator for them.<sup>122</sup> If the dispute involves more than \$50,000, the AAA sends the parties a short list of potential arbitrators. The list makes no mention that a party has the right to refuse any or all of the choices given.<sup>123</sup> Upon request, only the most basic information about the backgrounds of the arbitrators is provided. Assuming the litigant is aware of this possibility, a litigant may be able to discover whether the arbitrator has decided other cases involving her opponent. However, the litigant cannot learn the results of any of these past arbitrations.<sup>124</sup>

The possibility that the arbitrator selection procedures of AAA and other such organizations help speed the processing of disputes does not offset the deficiencies of such procedures. Taken together, these limitations make the selection of the arbitrator a fairly meaningless experience. Parties seldom know what they are getting in an arbitrator until it is too late to change.

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119. *Id.*

120. *Id.*

121. CAL. CIV. PROC. CODE. § 1281.6 (West 1994).

122. AMERICAN ARBITRATION ASS'N, CONSTRUCTION INDUSTRY ARBITRATION RULES, § 54(a), at 19 (1993).

123. *Id.* § 13, at 9.

124. Rueben, *supra* note 17, at 55.

*Loss of The Right to a Jury Trial.* Arbitration always proceeds without a jury. For many years, however, commentators have questioned the need for juries in civil matters, even in adjudication.<sup>125</sup> These commentators argue that juries lack competence to decide disputes and greatly slow the adjudication process.<sup>126</sup> Others believe that a jury, rather than a judge (or arbitrator for that matter), is better able to express the conscience of the community with respect to legal disputes.<sup>127</sup> Trial by jury also may have two less amorphous benefits.

First, according to many business management theorists, groups often are more likely to make better quality decisions than individuals deciding alone.<sup>128</sup> Vroom and Jago explain this preference for group-made decisions as stemming from three factors: (1) groups can bring to bear on a problem more information and knowledge, (2) groups can approach a problem from a greater number of perspectives, and (3) groups have the potential for synergy, for each member of the group to trigger ideas in the other members of the group.<sup>129</sup>

Second, as discussed below, the jury, at least for the parties involved in a dispute, symbolically represents society and in this way affords the party a sense of being heard.<sup>130</sup>

*Power of Arbitrator to Create Evidence.* Arbitrators are not bound by the evidence presented by the parties. Rather, the arbitrator, herself, may identify or create evidence. For example, an arbitrator may, without either party present, conduct her own, independent investigation of the facts.<sup>131</sup> Similarly, an arbitrator may consult with experts who have not been called as witnesses by either party.<sup>132</sup> An arbitrator is even permitted, under California law, to consult with a disinterested attorney for advice regarding her conclusions of law.<sup>133</sup> These rules are arguably part of what enables arbitrations to be completed more quickly than adjudications.

The arbitrator must disclose her actions to the parties and afford them an opportunity to meet the evidence found.<sup>134</sup> However, a court will not overturn

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125. See FRIEDENTHAL ET AL., *supra* note 93, at 474.

126. *Id.*

127. See, e.g., Laura G. Dooley, *Sounds of Silence on the Civil Jury*, 26 VAL. U. L. REV. 405 (1991).

128. See VICTOR H. VROOM & ARTHUR G. JAGO, *THE NEW LEADERSHIP*, 188, 94-101 (Prentice Hall 1988). In fact, in a study of 2,631 business managers conducted by Vroom and Jago, they found that 62% of the managers said that, if they needed a good quality decision, they would involve their subordinates in the decision-making process. See also JON R. KATZENBACH & DOUGLASS K. SMITH, *THE WISDOM OF TEAMS* 9 (McKinney & Co., Inc. 1993).

129. VROOM AND JAGO, *supra* note 128, at 188.

130. See *infra* note 155 and accompanying text.

131. *Canadian Indemnity Co. v. Ohm*, 271 Cal. App. 2d 703, 708-09 (1969).

132. *Id.*; See also *Sapp v. Barenfeld*, 34 Cal. 2d 515, 521, 212 P.2d 233, 238 (1949).

133. *Griffith Co. v. San Diego College for Women*, 45 Cal. 2d 501, 506-07, 289 P.2d 476, 479 (1955).

134. CAL. CIV. PROC. CODE § 1282.2(g) (West 1994); *Canadian Indemnity Co. v. Ohm*, 271 Cal. App. 2d 703, 708-09 (1969).

an arbitral decision because the arbitrator failed to inform the parties if the failure to inform and allow the parties to meet the evidence found was not substantially prejudicial.<sup>135</sup>

These powers, even as limited by a duty to inform, drastically reduce each party's ability to prepare for the arbitration and limit the predictability of the result. On the one hand, if a party cannot be certain about what evidence the arbitrator will consider, she cannot make informed strategy and settlement decisions. On the other hand, the lack of preparation may cause her presentation to be more authentic.

*Lack of Procedural Case-Combining Procedures.* Neither consolidation (the amalgamation of actions involving at least one common question of law or fact)<sup>136</sup> nor joinder of parties (the association of several persons or entities together as either plaintiffs or defendants)<sup>137</sup> is possible under arbitration. Neither procedure is expressly authorized by arbitration law. Also, both consolidation and joinder require that all parties have arbitration clauses in their contracts with each other *and* that those arbitration clauses expressly allow joinder and/or consolidation.<sup>138</sup>

Consequently, arbitration lacks the two benefits which have been ascribed to consolidation and joinder: (1) allowing the system to increase its productivity,<sup>139</sup> and (2) allowing courts to render complete justice without impairing the rights of non-parties.<sup>140</sup> Of course, the lack of joinder and consolidation in arbitration does help speed cases to final determination.

#### *Symbolic and Systemic Loss Flaws*

*Greater Potential for Bias in an Informal Setting.* Delgado, Dunn, Brown, Lee and Hubbert (hereinafter "Delgado et al.") argue that, although ADR has been promoted as egalitarian, the informality of ADR actually increases the likelihood of decision-maker prejudice, especially where a person of less power in society confronts a person of greater power and the decision-maker also is a person of greater power.<sup>141</sup> Delgado et al., note that the

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135. CAL. CIV. PROC. CODE § 1282.2(g) (West 1994); *Canadian Indemnity Co. v. Ohm*, 271 Cal. App. 2d 703, 708-09 (1969).

136. FRIEDENTHAL ET AL., *supra* note 93, at 315.

137. See MELLINKOFF, *supra* note 5, at 331-32.

138. Arbitration clauses do provide for joinder. The AMERICAN INSTITUTE OF ARCHITECTS FORM CONTRACT A201, is often used for or appended to construction contracts, and it expressly provides for joinder.

139. FRIEDENTHAL ET AL., *supra* note 93, at 315.

140. *Id.* at 337.

141. Delgado et al., *supra* note 17, at 1402.



formality of adjudication, its black robes, its deference to the flag, and its ritual, help to foster conformity to the American ideal of non-prejudicial behavior.<sup>142</sup> In contrast, less structured and more intimate interactions, such as arbitration, foster prejudice because the “human propensity to prejudge and make irrational categorizations” is not checked by sufficient procedural safeguards.<sup>143</sup>

Delgado et al., therefore, recommend that people of color and members of other traditionally disenfranchised groups would be better off opting out of the informality of arbitration.<sup>144</sup>

These contentions seem at odds with the argument of Gabel and Harris<sup>145</sup> that the formality of adjudication legitimizes the systematic social repression of those who lack power in our society.<sup>146</sup> Gabel and Harris believe that the legal system causes those who lack power to come to believe they properly belong “underneath” those in power and therefore to accept their powerlessness.<sup>147</sup>

The formality of the legal system, however, may be used to deconstruct the system. Gabel and Harris also argue that the symbolic formality of adjudication creates a potential for subversion by those who wish to change the system.<sup>148</sup> That potential does not exist, at least to the same degree, in a private, informal arbitral hearing.

*Loss of the Value of Precedent Creation.* Arbitration decisions have no effect as precedence.<sup>149</sup> On the one hand, as Gabel and Harris argue:

[A]n excessive preoccupation with ‘rights-consciousness’ tends in the long run to reinforce alienation and powerlessness, because the appeal to rights inherently affirms that the source of social power resides in the State rather than in the people themselves.<sup>150</sup>

On the other hand, a favorable adjudication result on an issue that is important to a particular community, whether it is a race-based, class-based, status-based or occupation-based community, can be exploited and shared by others in the community.<sup>151</sup> In this way, the establishment of “rights” by adjudication helps link individuals together in larger movements. On an

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142. *Id.* at 1387-88.

143. *Id.* at 1388-89.

144. *Id.* at 1403.

145. Gabel & Harris, *supra* note 62.

146. *Id.* at 371.

147. *Id.*

148. *Id.* at 399-402.

149. Brunet, *supra* note 17, at 13.

150. Gabel & Harris, *supra* note 62, at 375.

151. Penelope E. Bryan, *Toward Deconstructing the Deconstruction of Law and Lawyers*, 71 DEN. U. L. REV. 161, 168 (1993).

individual level, the establishment of "rights" may validate the recipients' feelings that they have been wronged by society and encourage them to believe in their self value.<sup>152</sup>

Precedent also benefits the legal system because it affects behavior. Precedent informs parties and attorneys regarding the likelihood of success; as a result, decisions regarding the filing and settling of lawsuits are easier. This type of informal dispute resolution occurs with little court involvement and reduces court congestion. Precedent also guides behavior in the sense that people strive to avoid litigation altogether by behaving in accordance with the law.<sup>153</sup>

*Loss of Symbolic Benefit of Public Assertion of Rights.* Gabel and Harris argue that the public assertion of rights causes persons who lack power in society to accept their powerlessness and to reify their own repression.<sup>154</sup> The assertion of one's feelings of having been mistreated in a public forum, however, may have some salutary effects.

The mere statement in a public forum that one has been wronged arguably empowers the claimant, regardless of result. Adjudication takes place in public, in front of an authority figure, who is clothed in the garb and with the accoutrements of societal power. It also involves a jury, which furthers both a sense of careful decision-making and a sense of being heard.<sup>155</sup> This feeling of "having had one's day in court" is much less likely to occur in the very private, informal atmosphere of an arbitration. The arbitrator is not clothed with respectability and the only persons who witness the arbitral hearing are the disputants, their attorneys and the arbitrator. This privacy may create a feeling of secrecy and cover-up, so that the claimant feels she has not been heard at all.

The public airing of disputes also has the potential to benefit society as a whole. Public trials may have a symbolic value to those who witness them; they are reminded of the ideals of this society and of their own opportunity for redress and protection from wrongdoing.<sup>156</sup>

*Suppression of Participant Power.* Arbitration suppresses participant power while inflating the power of the decision-maker, the arbitrator. As shown above, the parties' power to select their decision-maker is illusory, and the parties have no control over the flow of information. Most importantly, unlike adjudication where the parties have a right to appeal, or mediation

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152. Grillo, *supra* note 7, at 1566-67.

153. Brunet, *supra* note 17, at 20, 23.

154. Gabel & Harris, *supra* note 62, at 573.

155. See Judith Resnick, *Tiers*, 57 S. CAL. L. REV. 837, 848-49 (1984).

156. See Parker & Hagin, *supra* note 55, at 1912.

where the parties have the right to say “no,” the arbitrator maintains absolute power.

*Arbitration is a Poor Substitute for Genuine Reform.* The untoward emphasis on arbitration (as well as on other forms of ADR to some extent) seems to be an unconscious dodging of the problems with adjudication and the legal system as a whole. Rather than confronting these flaws and attempting to reform or reformulate the system, lawyers, judges and academics have embraced arbitration as well as other forms of ADR. In this sense, the connection between the rise of ADR and the increase in criticisms of the legal system, described above,<sup>157</sup> can be seen as a systemic avoidance mechanism which deflects the focus from the core criticisms of the legal system.

### *Results Flaws*

*Lack of Legal Standards.* No law requires arbitrators to follow the applicable or controlling law, even where application of the law would unquestionably mandate a particular result. As the California Supreme Court recently held, “[A]rbitrators are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make their award *ex aequo et bono* [according to what is just and good].”<sup>158</sup>

As a result, parties to an arbitration may be bound by an award “reached by paths neither marked nor traceable . . . .”<sup>159</sup>

As Jane Korn argues, the absence of legal guidelines may allow for more flexible, less rule-defined decision-making.<sup>160</sup> However, the absence of legal guidelines greatly inhibits the predictability of arbitration and therefore makes settlement of disputes very difficult. It probably also increases the likelihood of arbitral decisions influenced by racial, class or gender prejudices,<sup>161</sup> or by the arbitrator’s economic self-interest.<sup>162</sup>

*Lack of Review of Arbitral Results.* Three reasons account for the minimal review given to arbitral awards.

First, there is no written record of an arbitration. The lack of a record insulates the arbitration decision from meaningful review.<sup>163</sup>

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157. See *supra* notes 54 - 69 and accompanying text.

158. *Moncharsh v. Heily & Blase*, 3 Cal. 4th 1, 11, 832 P.2d 899, 904 (1992) quoting *Muldrow v. Norris*, 2 Cal. 74, 77 (1852).

159. *Id.*

160. Korn, *supra* note 15, at 102.

161. See *Delgado et al.*, *supra* note 17, at 1402.

162. See *Rueben*, *supra* note 17, at 53.

163. See *Moriarty v. Carlson*, 184 Cal. App. 2d 51, 54 (1960) (if there is no record for review, findings of arbitrator are presumed correct).

Second, an arbitrator has no duty to explain her decision.<sup>164</sup> In fact, AAA tells its arbitrators that they should not explain the reasons for their decision so as to insulate their awards from review. Therefore, arbitrators regularly refuse to explain or justify their decisions.<sup>165</sup>

Third, in the majority of jurisdictions, an appellate court may review an arbitral decision only if the award or the arbitration involved fraud, corruption or undue means.<sup>166</sup> Appellate courts do not review the form and sufficiency of the evidence, nor the credibility and good faith of the parties and witnesses nor the arbitrator's conclusions of fact.<sup>167</sup> Neither may appellate courts review the arbitrator's interpretation of a contract,<sup>168</sup> nor her conclusions of law or application of law to fact.<sup>169</sup> Even an egregious error of law is not reviewable.<sup>170</sup>

Without the time and expense of appeal, and because arbitrators are not concerned by the possibility of review, arbitrations proceed to decision more cheaply and rapidly. On the other hand, the lack of control over the results of arbitrations increase the likelihood of results influenced by bias or by the arbitrator's own economic self-interest because the arbitrator knows she cannot be overruled. The unavailability of appeal also reduces predictability in arbitral results and the attendant benefits of predictability, such as assisting parties in making decisions regarding the filing and settling of lawsuits.

*Possibility of Lesser Accuracy.* Edward Brunet argues that an important goal of any dispute resolution process is "accurate" results.<sup>171</sup> However, deficiencies in all forms of ADR cause all forms of ADR to be less "accurate" than adjudication.<sup>172</sup> According to Brunet, the lack of effective discovery in ADR causes a loss of information, and that information "is essential to quality decision making."<sup>173</sup> Furthermore, the lack of reasoned statements of decision in ADR also inhibits accuracy.<sup>174</sup>

Quality dispute resolution, according to Brunet, also requires a following of the principles of substantive law because the substantive law establishes

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164. *Sapp v. Barenfeld*, 34 Cal.2d 515, 522, 212 P.2d 233, 239 (1949).

165. *Rau*, *supra* note 15, at 2028 n.85.

166. *Moncharsh v. Heily & Blase*, 3 Cal.4th 1, 21-22, 832 P.2d 899, 911 (1992).

167. *Id.*

168. *Wetsel v. Garibaldi*, 159 Cal. App. 2d 4, 12 (1958).

169. *Moncharsh*, 3 Cal.4th at 23, 832 P.2d at 912.

170. *See, e.g., Woodard v. Southern Cal. Permanente Medical Group*, 171 Cal. App. 3d 656, 662 (1985). A minority of jurisdictions do permit review of such errors. *See infra* note 192 and accompanying text.

171. Brunet, *supra* note 17, at 15.

172. *Id.* at 54-55.

173. *Id.* at 33-34.

174. *Id.* at 43.

norms for decision-making.<sup>175</sup> He argues that the lack of legal standards for decision-making may prevent the ADR decision-maker from remaining impartial.<sup>176</sup>

Other factors, not discussed by Brunet, which may reduce the accuracy of arbitration include the lack of arbitrator ethics or review, the lack of witness oaths, and the lack of required qualifications to be an arbitrator. The absence of these factors opens up possibilities of abuse and therefore of inaccuracy. Even if one does not quite share Brunet's faith in identifying "quality" in decision making or his implicit belief that a "truth" can exist or be found in a dispute,<sup>177</sup> his assertion that decisions can be better informed through discovery, and less biased through the use of precedent to set guiding norms, make sense.

*The Relationship Between the Asserted Deficiencies of Arbitration and the Asserted Benefits of Arbitration*

What is ironic about the deficiencies of arbitration described above is that they stem, in large part, from the benefits of arbitration. Each asserted benefit of arbitration resonates in the deficiencies such that the deficiencies appear almost inherent in the institution of arbitration.

For example, to preserve the benefits of greater speed and lower cost, arbitration cannot include a formal pleading requirement, discovery or jury trials. In fact, the lack of pleading and discovery are cited both as benefits of arbitration and as explanations for the greater speed and lower cost of arbitration.<sup>178</sup>

Pleading, discovery and juries usually require extensive involvement by attorneys, and both pleading and discovery involve the risk of attorney abuse. Pleading and discovery also require a decision-maker to have legal expertise, a requirement which conflicts with an asserted benefit of arbitration, the ability to use expert decision-makers.

The choice to avoid applying the rules of evidence in arbitration stems from the same three asserted benefits of arbitration. Speed would be decreased and cost would be increased by a system that requires the decision-maker to evaluate evidentiary objections. More importantly, the desire for expert decision-makers, who often are non-lawyers, limits the possibility of applying the rules of evidence.

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175. *Id.* at 25.

176. *Id.* at 26.

177. Brunet notes the subjectivity of the term "quality." *Id.* at 8. Nevertheless, Brunet operates under an assumption that he can define "quality" and apply it to adjudication and ADR.

178. Rau, *supra* note 15, at 2027-28.

The relationship between the lack of an oath requirement and of ready sanctions for perjury, on the one hand, and the asserted benefits of arbitration, on the other hand, is less clear. Perhaps these deficiencies can be linked to the greater informality of arbitration which stems, in turn, from the speed and cost considerations. Further, the fact that an expert, rather than a judge, is involved greatly inhibits the use of oaths and sanctions for perjury.

Deficiencies in arbitrator selection can be directly tied to the twin goals of greater speed and lower cost. Evidence of the connection between the desire for speed and low cost and the deficiencies in selection is demonstrated by the AAA's policy of selecting the arbitrator for the parties as part of its "expedited procedures."<sup>179</sup> In other words, greater speed requires less participant involvement in the arbitrator selection process. Moreover, the expense required for full arbitrator background disclosure, for reviews of arbitrator competency and for administration of arbitrator ethical standards surely would be passed on to the consumers of arbitral services in the form of greater fees.

The use of "expert" decision-makers may have played a role in conferring power to arbitrators to conduct their own independent investigations. This power may derive from a belief that arbitrators, unlike judges in adjudication, are likely either to need or to seek such help. Allowing arbitrators to conduct their own, independent investigations also could stem from the desire for greater informality in arbitration (which has both speed and cost ramifications).

The inability to consolidate cases or to join parties results from the private nature of arbitration agreements. Such agreements, like all contractual promises, bind only the parties involved and only to the extent specified therein.

The privacy and informality of arbitration, the desire for flexible arbitral decisions and the use of "expert" (non-lawyer) decision-makers combine to prevent arbitral decisions from having effect as precedents and cause a loss of the benefits that attend the creation of precedent. Likewise, the use of "expert" decision-makers who are not attorneys or judges and the desire for flexibility necessarily include a trade-off in the arbitrator's ignorance of legal doctrine and in the legal system's inability to review arbitral decisions.

The increased possibility of arbitrator prejudice, the dis-empowerment of the participants and the potential for inaccuracy all stem from combinations of the deficiencies and therefore arise out of the asserted benefits of arbitration. For example, the greater potential for inaccuracy in arbitration is a result of the lack of discovery and pleadings and the failure to require the application of

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179. AAA FORM, *supra* note 90, §§ 53-57.



legal doctrines. These deficiencies, as shown above, spring from the asserted benefits of arbitration.

#### *Conclusions Regarding the Deficiencies in Arbitration*

Two overarching points can be made regarding the deficiencies in arbitration. First, the proponents who trumpet arbitration have ignored some very troubling deficiencies in arbitration. Second, and perhaps more importantly, the deficiencies in arbitration all come directly from the benefits of arbitration. This latter fact makes reform of arbitration very challenging.

#### IV. POSSIBLE SOLUTIONS FOR THE DEFICIENCIES IN ARBITRATION

Solutions for deficiencies in arbitration potentially lie in two separate spheres. Both the legislatures and courts have the power to regulate the arbitration process. Parties, however, need not wait for either governmental branch to act; parties may try to address arbitration deficiencies themselves by drafting their arbitration agreements to address the deficiencies.<sup>180</sup>

This section examines how arbitration law might be changed, either by statute, case law or by the parties' arbitration agreement. As explained in Part V, some of the deficiencies in arbitration cannot be fixed. For example, the symbolic or systemic flaws cannot really be addressed by reforms in arbitration. Also, solutions that have no genuine possibility of occurring because they cannot, as a practical matter, be grafted onto arbitration, are not addressed in this section. This section therefore does not address adding jury trials to arbitration, allowing arbitrations to have precedential effect or making arbitrations into public hearings.

#### *Process Solutions*

##### *Claim Disclosure Solutions*

It would not be particularly hard to require greater pleading formality in arbitration. Parties could be required to disclose their theories of liability and defense. Likewise, modern discovery procedures could be added to arbitration. Under California law, for example, if the arbitration agreement expressly adopts Code of Civil Procedure § 1283.05, the parties are permitted to conduct

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180. Any suggestion that procedures or provisions be created by the parties' arbitration agreement must take into account the concern of those who regularly draft contracts, that a party who proposes a very detailed arbitration clause may be forced to trade off "deal points" to obtain assent to a detailed arbitration clause. A party who proposes a detailed arbitration clause also may be seen as introducing an undesirable adversarial emphasis into the contract negotiations. Finally, some parties may want to take advantage of the slow speed and expense of adjudication to exploit their greater economic wherewithal.

discovery, subject to the limitation that approval be obtained from the arbitrator to take depositions.<sup>181</sup>

California law also provides that, if the amount of money in dispute exceeds \$50,000, and the arbitrator is properly informed of the request, either party may obtain a list of the other party's percipient and expert witnesses and the documents the other party intends to introduce.<sup>182</sup> There is no reason that such disclosure could not be required in all cases.

Edward Brunet recommends that any solution in this area incorporate greater judicial involvement to help ensure, through the court's contempt powers, that the disputants are forthcoming in sharing information with each other.<sup>183</sup>

#### *Evidentiary Control*

Similarly, the parties, legislatures or courts could require, in whole or part, the application of the rules of evidence in arbitration. California law only provides that the "rules of evidence . . . need not be observed,"<sup>184</sup> suggesting at least the possibility that the parties can contractually bind themselves and the arbitrator to following the rules of evidence.

#### *Witness Honesty*

California arbitration law also permits a party, by request, to require that the witnesses testify under oath.<sup>185</sup> There is no reason that such an oath should not always be included. As I explain below, enforcement of any oath, however, is much more difficult.<sup>186</sup>

#### *Selection and Qualifications of the Arbitrator*

The parties themselves or the legislature could establish minimum qualifications which an arbitrator must possess. It is even possible to require arbitrators to undergo special training, testing and licensing procedures. The parties or the legislature can require the arbitrator to swear an oath and the legislature could establish professional obligations for all those who hold themselves out as arbitrators, while arbitrator organizations could adopt ethical guidelines.

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181. CAL. CIV. PROC. CODE §§ 1283.1, 1283.05(e) (West 1982). No such provision is included in the Uniform Arbitration Act which has been adopted, by the most recent count, in 35 states. *Table of Jurisdictions Wherein Act Has Been Adopted*, UNIF. ARBITRATION ACT, 7 U.L.A. 1 (Supp. 1994).

182. CAL. CIV. PROC. CODE § 1282.2(a)(2) (West 1982). Copies of such documents must be made available to the other party for inspection. *Id.*

183. Brunet, *supra* note 17, at 53-54.

184. CAL. CIV. PROC. CODE § 1282.2(d) (West 1982).

185. *Id.*

186. *See infra* note 205 and accompanying text.

*Arbitrator's Power To Create Evidence*

The legislature and the parties to an arbitration agreement also have the ability to curb or even eliminate the arbitrator's power to conduct her own investigation and to consult with experts of her own choosing. California, as noted above, requires the arbitrator to inform the parties of such activities and to allow them to address whatever she learns on her own.<sup>187</sup> It would only be a small step to prohibit such activity altogether.

*Result Solutions**Lack of Legal Standards*

Arbitration law or the parties' arbitration agreement can require the arbitrator to follow the applicable law. In dicta, at least one California court has suggested that the parties can make a binding agreement that the arbitrator must follow the law.<sup>188</sup>

*Lack of Review*

First, law or the parties' arbitration agreement may require the arbitration be stenographically recorded, and the arbitrator may be required to issue a detailed statement of the decision. Second, at least theoretically, an arbitration agreement can provide for a right of appeal. In *Kauffman v. Shearson Hayden Stone, Inc.*,<sup>189</sup> the parties' arbitration agreement provided for appellate review of the arbitrator's decision.<sup>190</sup> *Kauffman* did not address the propriety of such a clause, but at least the court did not indicate that such a clause was improper.

Edward Brunet advocates a lesser degree of review; he proposes that a brief form of judicial scrutiny be included before the matter is heard and, again, after the matter has been decided, when the court is in the process of affirming the arbitral award.<sup>191</sup> As a student note explains, some of the state courts have experimented with varying standards of limited appellate review such as "gross legal error," "manifest disregard of the law," and "error on the face" of the award.<sup>192</sup>

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187. CAL. CIV. PROC. CODE § 1282.2 (West 1982); *Canadian Indemnity Co. v. Ohm*, 271 Cal. App. 2d 703, 708-709 (1969). *Ohm*, however, limits this rule to situations where the failure to inform the parties prejudices the other party. *Id.*

188. *Harris v. Havenar*, 169 Cal. App. 2d 531, 534 (1959).

189. 128 Cal. App. 3d 809 (1982).

190. *Id.* at 811.

191. Brunet, *supra* note 17, at 53.

192. Cheryl Aptowitzer, Note, *Judicial Review of Arbitration Awards - Courts May Review and Vacate an Arbitration Award Where an Arbitration Commits Gross, Unmistakable, or Not Reasonably Debatable Errors of Law or Where the Arbitration Manifestly Disregards the Law and the Result is Unjust-*

## V. WHY ARBITRATION MUST COLLAPSE

This addresses the efficacy of the proposed solutions. First, the deficiencies that cannot be addressed by reform of arbitration are identified. Second, the proposed reforms themselves are evaluated and some of the difficulties that might arise in implementing the reforms are explained. Finally, I argue that the reform of arbitration will destroy its efficacy.

*Inability to Address All the Deficiencies of Arbitration*

Any reform of arbitration simply cannot address all of its deficiencies. Arbitration is not susceptible to the addition of certain procedural reforms, such as adding jury trials or allowing consolidation and joinder. Arbitration also cannot really be reformed in such a way as to meaningfully redress its symbolic and systemic flaws.

*Unremediable Process Flaws*

As a practical matter, it probably would be impossible to establish a jury trial system for arbitrations. The legal system has the power to compel potential jurors, at least those who lack one of the excuses recognized by the jurisdiction, to serve through the threat of sanctions.<sup>193</sup> No such power could be conferred on private dispute resolution. Moreover, the administration of a jury system would be hopelessly complicated.

In adjudication, the jury usually decides the questions of fact and the judge decides the questions of law.<sup>194</sup> How such a division might work for an arbitration is unfathomable. Parties chose arbitration because, among other things, they desire a decision-maker who has special expertise. If a jury, rather than the arbitrator, were deciding the factual issues, there no longer would be a need for an arbitrator as opposed to a judge. Also, the arbitrator, under such a scenario, would be relegated to deciding legal issues, a task for which she may not be qualified.

For a very different reason, the case combining procedures of consolidation and joinder cannot be grafted onto arbitration. Binding arbitration is mostly the exclusive realm of contract law; the parties must agree that their dispute(s) will be resolved by arbitration. The procedures of joinder and consolidation, of course, necessarily require that the person who is joined or the case that is consolidated be subject to the jurisdiction of the combining

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Perini Corp. v. Great Bay Hotel and Casino Inc., 129 N.J. 479, 610 A.2d 364 (1992), 24 SETON HALL L. REV. 998 (1993).

193. FRIEDENTHAL ET AL., *supra* note 93, § 11.10, at 523.

194. *Id.* § 11.2, at 478.

court.<sup>195</sup> In arbitration, jurisdiction is conferred by the parties' arbitration agreement. There is no way to assure that parties whose joinder or consolidation may be sought also are bound to contractual arbitration clauses, nor is there any guarantee that such clauses also would contain a provision allowing joinder or consolidation.

#### *Unremediable Symbolic or Systemic Flaws*

An arbitrator's greater potential for bias also cannot be remedied. The potential for bias, as Delgado et al. argue, stems from the informality of arbitration and therefore is endemic to the nature of arbitration.<sup>196</sup> Likewise, by its very nature, arbitration cannot remedy the loss of creating precedent or create the personal gains from the public airing of grievances. While the reforms discussed above can help address some of the deficiencies in arbitration that cause the suppression of participant power and the creation of disproportionate arbitrator power, as discussed below, these power issues are inherent in any form of binding arbitration and cannot be remedied without destroying the asserted benefits of arbitration.

The possibility that arbitration is a convenient distraction from the problems with adjudication also cannot be addressed by reforming arbitration. Rather, this problem requires the members of the legal system and society to confront the problems of adjudication by questioning the very essence of the legal system.

#### *Potential Complexities in Individual Solutions*

On their face, the solutions suggested above appear relatively straightforward and easy to implement; in fact, they may be hopelessly complicated, and they would create as many problems as they would solve.

#### *Claim Disclosure Solutions*

Both the pleading and discovery solutions raise a number of important and intricate sub-issues. Reform of arbitration pleading would require assessment of which aspects of modern pleading law to incorporate. Most jurisdictions require some form of notice or fact pleading.<sup>197</sup> However, if a claim is not entirely based on legal doctrine, which is permissible under arbitration law,<sup>198</sup> the form of such notice is problematic. The addition of discovery to arbitration raises an even greater number of complications. On

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195. *Id.* § 6.5, at 342.

196. *See supra* notes 141-144 and accompanying text.

197. FRIEDENTHAL ET AL., *supra* note 93, § 5.4, at 244.

198. Moncharsh v. Heily & Blase, 3 Cal. 4th 1, 11, 832 P.2d 899, 904 (1992).

the one hand, there is a desire to limit the amount of discovery to preserve the speed and lower cost advantages for which arbitration is lauded. This inclination is manifested in California's deposition limitations.<sup>199</sup> On the other hand, the need for information in any particular case depends on a number of factors that any rigid limitation could not consider. The factors include: the complexity of the issues in the case, the number of issues, how cooperative the parties and their attorneys are, the difficulty of finding witnesses, the extent of the need for expert testimony and the nature of the expertise needed, the economic resources of the parties, the amount of money at stake in the dispute, and the significance of the issues at stake to the parties. It is widely perceived that discovery is regularly abused in adjudication;<sup>200</sup> the absence of a successful solution to this problem for adjudication suggests the difficulty of establishing optimal limitations on discovery in any form of dispute resolution.

Enforcement of discovery rights, once established, presents equally perplexing problems. California law provides that, if discovery is permitted, the arbitrator has the same powers with respect to enforcement as a judge in a superior court action.<sup>201</sup> Such powers seem fairly necessary to give discovery rights any genuine meaning. Those powers, however, include the ability to punish "abuse" (which includes non-compliance and over-use) by: (1) monetary sanctions (charging the abuser the other party's expenses in consequence of the abuse); (2) issue sanctions (deciding an issue adversely to the abuser); (3) evidence sanctions (preventing the abuser from introducing evidence that was the subject of an abuse); (4) terminating sanction (adversely deciding an entire lawsuit or claim against the abuser); and/or (5) contempt sanctions (treating abuse as a form of contempt).<sup>202</sup>

These powers raise troubling questions regarding the capacity of all arbitrators to understand and apply discovery law, the ability to create some form of immediate appellate court review, such as mandamus, the awkwardness of tailoring sanctions to particular issues given the informality in the pleadings, and the difficulty of conferring contempt power on an arbitrator. Even if contempt power could be conferred on an arbitrator, conferring such a power raises other important questions.<sup>203</sup>

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199. Depositions are allowed in California arbitrations only upon application to the arbitrator and only if the arbitrator permits them. CAL. CIV. PROC. CODE § 1283.05(e) (West 1982).

200. See FRIEDENTHAL ET AL., *supra* note 93, § 7.18, at 422.

201. CAL. CIV. PROC. CODE § 1283.05(b), (c) (West 1982).

202. CAL. CIV. PROC. CODE § 2023 (West 1982).

203. For example, a judge can order that a person be jailed for contempt. DAN B. DOBBS, LAW OF REMEDIES § 2.8(1), at 130 (2d ed.). Could and should an arbitrator be given the power to jail persons she holds in contempt? How can an arbitrator be given such power?



### *Evidentiary Control*

Problems also confound the application of evidence law in arbitrations. First, the capacity of arbitrators to develop sufficient fluency with the nuances of evidence law seems questionable. Second, time and informality constraints make including the entire body of evidence law in arbitration undesirable, yet it is difficult to determine which aspects to include or exclude. Most importantly, we assume that a judge who hears inadmissible evidence can ignore its possibly prejudicial effect because of her experience, her familiarity with evidence law, her awareness of the possibility of appellate review of any biased decision, and her required professional ethics.<sup>204</sup> With an arbitrator, these controlling factors either may be less powerful or non-existent. The arbitrator's ability to avoid being prejudiced by improper evidence is entirely dependent on the arbitrator's educational and employment background, life experience and values.

### *Witness Honesty*

The inclusion of an oath requirement raises similar enforcement issues as well as other, more serious concerns. In adjudication, perjury exists as the threat that, at least theoretically, inhibits witness dishonesty. However, the mechanisms for punishing perjury committed in arbitration are not readily apparent; it is likely that the arbitrator herself would have to testify in any perjury hearing.

Moreover, the informality of arbitration itself may encourage dishonesty in much the same way that the informality of arbitration fosters bias. Other forms of socially desirable behavior other than egalitarianism, such as truthfulness may also be less likely to occur in arbitration than in adjudication, where the formality, ritual and the positioning of the judge (above everyone) may create pressure to act honestly.<sup>205</sup> At the very least, a judge is a much more imposing figure, by her positioning, dress and reputation than an arbitrator, who wears business clothes, sits across the table from the witness and has no pre-existing cultural image. Fear of punishment for perjury is therefore much more likely in adjudication than in arbitration.

### *Selection and Qualifications of the Arbitrator*

The proposed solutions to the problems of selection and qualifications of arbitrators also are more complicated than they appear at first glance.

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204. See generally MCCORMICK ON EVIDENCE, *supra* note 104, § 60, at 238.

205. Social psychologists believe that people change their behavior to conform to what is expected of them, especially in very formal settings. Delgado et al., *supra* note 17, at 1387-88.

Deciding who is qualified to arbitrate raises questions regarding what personal qualities, professional experiences and educational backgrounds might be predictive of skillful dispute decision-making. Because arbitration occurs privately, and therefore cannot be effectively studied, the possibility of empirically testing any set of proposed qualifications does not exist. Even if arbitration were not private, decision-making skill simply may be too subjective a criterion to consider.

Even a carefully crafted set of ethical standards would only be of limited help. The privacy of arbitrations make enforcement of such standards nearly impossible. To avoid sanctions for violating any such standards, an arbitrator who wishes to maximize the likelihood of return business needs only one, significant disputed fact on which she can claim to have based her decision. Arbitrators therefore can insulate themselves from criticism or punishment for misbehavior. This problem is compounded by the proposal to establish arbitrator qualifications. If the pool of arbitrators is too limited, even the best set of ethical standards cannot prevent arbitrators from being selected to decide disputes involving parties who have appeared before them on prior occasions, and who will appear before them in the future.

#### *Results Solutions*

Requiring arbitrators to follow the law and subjecting arbitral decisions to appellate review also will be difficult to implement. A requirement that arbitrators follow the law is only meaningful if appellate review exists to verify that the arbitrator followed the law. Moreover, for appellate rights to be effective, the decision-maker must possess substantial legal sophistication and the proceedings must be stenographically or audio-visually recorded. The existing, already-burdened appellate system would have to be adapted to handle arbitral appeals. Standards of review could vary from the adjudication standards, as they presently do,<sup>206</sup> or courts could treat arbitration appeals just like they treat adjudication appeals. Either possibility raises additional problems.

The current standards of review for arbitration require that the error fit into a narrow and, at the same time, indeterminate definition (i.e., "gross error," "error on the face of the award," "manifest disregard of the law");<sup>207</sup> as a result, appellate success is unpredictable and haphazard. On the other hand, the adjudication standards of review are tailored to the adjudication form of decision-making (which includes juries as fact-finders, for example, which is

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206. See Aptowitz, *supra* note 192, at 1001.

207. *Id.* at 1001-03.

not possible in arbitration) and therefore may prove difficult to apply to private, closed, arbitrator-decided arbitration results.

*The Conflict Between the Solutions for Arbitration Deficiencies and the Nature of Arbitration*

Even if arbitration's problems could be solved and we were to decide that we can live with our inability to solve some of the deficiencies of arbitration, arbitration would not survive the reform process. Regarding the proposal that review of arbitration be expanded, the California Supreme Court noted in *Moncharsh*, "[e]xpanding the availability of judicial review of such decisions 'would tend to deprive the parties to the arbitration agreement of the very advantages the process is intended to produce.'"<sup>208</sup>

This conclusion stemmed from the court's perception that any change to arbitration that either incorporates the legal system or its procedures necessarily conflicts with the parties' desire to bypass that system.<sup>209</sup> Close examination of the proposed solutions discussed above reveals that the proposed changes would only transform arbitration into a poorer, less attractive form of adjudication while virtually eliminating the asserted benefits of arbitration.

The creation of discovery rights, pleading rights, evidentiary objections and an obligation to follow the law would eliminate the possibility in most, if not all, cases of using decision-makers who may not be trained in the law but who possess technical expertise in the industry, trade or profession in dispute. Legal issues require decision-makers who possess training, knowledge and skill in legal analysis. Indeed, it seems likely that any suggested list of arbitrator qualifications would include legal expertise. Further, the need for decision-makers with legal expertise will severely limit the number of available arbitrators. Any reduction in the supply of available decision-makers has at least the potential to impact the speed of decision-making.

Privacy also would have to be sacrificed in the name of reform, at least to the extent that the arbitral decisions could be appealed by the non-prevailing party. The current, strict limits on appellate review almost certainly serve to discourage appeal; an expansion of the grounds for appeal necessarily would increase the likelihood of such appeal.

Moreover, the addition of adjudication procedures will substantially reduce the time and cost savings of arbitration. Pleading motion practice, discovery and discovery motion practice, evidentiary objections and rulings, even oath requirements and enforcement of oaths all consume substantial time

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208. *Moncharsh v. Heily & Blase*, 3 Cal. 4th 1, 10 (1992).

209. *Id.*

and increase attorney fees. Likewise, any requirement that the proceedings be recorded and other efforts to create an appellate record, such as detailed statements of decision, will also prolong the arbitration process and increase the cost of arbitration. In arbitration, the increase in cost by all of these procedures is magnified by the fact that the parties must pay for the arbitrator's time. Legal accuracy by the arbitrator in all of these areas (discovery, pleading, evidence, substantive law) will require substantial effort and time. Consequently, the time and cost savings that arguably justify arbitration in the first place would be minimized and probably lost altogether.

Finally, if the arbitrator is required to follow the law she loses the flexibility to make non-traditional and creative decisions. Instead of making a relationship-preserving decision, she is forced to make a decision that categorizes the participants into winners and losers because the law she must apply almost always requires such decisions.

In short, arbitration must be fixed, yet it cannot be fixed and still survive. Arbitration left unchanged is intolerably flawed; arbitration modified loses the qualities that make it attractive. Accordingly, arbitration cannot survive as an important form of dispute resolution.

#### CONCLUSION

In addition to having revealed the intractable flaws of arbitration, I hope this article has offered some insight into how the legal system has defined its own problems and then confined the solutions. Arbitration and adjudication are presented as a matched set of either-or choices, yet neither is particularly attractive on its own, and both can be "reformed" only through a process of becoming more like the other. The question posed by this apparent Catch-22 becomes troubling. If adjudication is flawed and arbitration should neither be kept the same nor reformed, what can we do?

An answer may lie within the supernova analogy with which I began this article. Scientists theorize that, after a supernova has collapsed into a neutron star, the debris spreads into space and may be reformulated, with other ingredients, into a new star.<sup>210</sup> A similar possibility exists in the collapse of arbitration. This opportunity could be a chance to use what we have learned from arbitration to devise a new and better form of ADR. Better yet, the collapse of arbitration affords us a chance to examine the legal system in ways similar to those expressed herein and to contemplate either meaningful reform

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210. LIGHTMAN, *supra* note 1, at 46.

of that system or to contemplate how to reengineer<sup>211</sup> a legal system that is more responsive to its users.

The benefits asserted for arbitration might be incorporated in either a reform or a reengineering of the legal system. Accordingly, any such reform or reengineering should attempt to incorporate: greater accessibility through reduced cost, speedy resolution of disputes, less rigid adherence to legal doctrine where such adherence conflicts with justice and/or the interests of the parties, an ability to identify and benefit from expert decision-makers, and the ability to fashion decisions that do not polarize the parties into winners and losers. At the same time, such reform or reengineering should try to avoid the deficiencies outlined in this article.

The collapse of arbitration presents an opportunity that should not be missed.

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211. Reengineering is the "fundamental rethinking and the radical redesign of . . . processes to achieve dramatic improvements in critical . . . measures of performance . . . ." MICHAEL HAMMER & JAMES CHAMPY, REENGINEERING THE CORPORATION: A MANIFESTO FOR BUSINESS REVOLUTION, 32 (Harper Business 1993). Although Hammer and Champy's ideas were conceived for businesses interested in changing themselves, they also have meaning for change in the legal system. A fundamental rethinking about how the legal system does its business is in order.